



Entered on Docket  
June 08, 2005

A handwritten signature in black ink, appearing to read "Gregg W. Zive", is located in the top right corner.

Hon. Gregg W. Zive  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:

Case No. 03-52753  
Chapter 7

SHUEY, CHRISTINE, N.,

Debtor.

JUDGMENT

IT IS HEREBY ORDERED, DECREED AND ADJUDGED, consistent with the Court's Memorandum Decision (attached hereto as Exhibit "A") entered in this matter, that judgment shall be entered in favor of Debtor and that 75 percent of the periodic deductions from Debtor's paychecks deposited into the Savings Plan were and are exempt.

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7 UNITED STATES BANKRUPTCY COURT  
8 DISTRICT OF NEVADA  
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Chapter 7

13 SHUEY, CHRISTINE, N.,  
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15 Debtor.  
16 \_\_\_\_\_/

17 MEMORANDUM DECISION

18 FACTS

19 Debtor, Christine N. Shuey ("Debtor"), filed her bankruptcy petition August 12, 2003.  
20 She is a flagger for Granite Construction and a member of Laborers' International Union of North  
21 America, Local 169. At the time of filing, Debtor had \$3,526.00 in her Construction Workers  
22 Vacation Savings Trust Plan ("the Savings Plan"). The Savings Plan was created pursuant to the  
23 Construction Workers Vacation Savings Trust Plan, Vacation Trust Agreement and Declaration of  
24 Trust, dated April 11, 1980, as amended, ("Agreement") between the Nevada Chapter of the  
25 Associated General Contractors of America, Inc. and the Laborers' International Union of North  
26 America, Local 169.  
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28 The Agreement provides for payments of a certain sum for each hour an employee is

1 compensated into the Savings Plan established for the benefit of the employee. Money paid into  
2 the Savings Plan is deducted from employees' paychecks by their employer. No law requires that  
3 these funds be deducted; rather, the deductions are taken pursuant to the Agreement between the  
4 union and the union employers. As a union member, Debtor is bound by the Agreement. If there  
5 were no deposits into the Saving Plan pursuant to the Agreement, Debtor would have been paid  
6 directly the amount that was deducted from her paycheck.

8 Granite Construction was Debtor's union employer. As set forth in Article II, Section 8,  
9 of the Agreement, as amended in June 1982, Granite Construction deducted a percentage from  
10 Debtor's paycheck and deposited it into her Savings Plan. The monthly payment was made on or  
11 before the 25<sup>th</sup> day of the calendar month immediately following the month for which the  
12 deductions accrued. The accumulated funds normally were paid to the Debtor annually, on or  
13 about December 1<sup>st</sup>. Debtor used these funds to pay her living expenses during the winter months  
14 when she was not working regularly.

16 Believing that a portion of the accumulated funds was exempt under NRS 21.090(1)(g),  
17 Debtor claimed, on schedule C of her petition, an exemption of \$2,645.00, 75 percent of the  
18 deductions from her periodic paychecks that were deposited into the Savings Plan. These funds  
19 were generated entirely through deductions from Debtor's paychecks from June 1, 2002, through  
20 May 31, 2003.<sup>1</sup>

22 The Chapter 7 Trustee objected to the exemption. The Assistant U.S. Trustee joined the  
23 objection, arguing that Debtor's Savings Plan is not exempt because NRS 21.090(1)(g) exempts  
24 only periodic payments of earnings, not lump sum distributions or accumulations.

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27 <sup>1</sup> There were additional deductions made between June 1, 2003 and August 12, 2003, the  
28 date this Chapter 7 case was commenced. Those amounts were not quantified at the time of the  
hearing. Any contributions post-petition are not property of the estate. 11 U.S.C. § 541(a).

1 DISCUSSION

2 The issue is whether the money deducted from Debtor's paychecks and accumulated in her  
3 Savings Plan from June 1, 2002, through May 31, 2003, is 75 percent exempt, given that NRS  
4 21.090(1)(g) only exempts periodic payments of disposable earnings, and Debtor is paid from her  
5 Savings Plan in a lump sum once a year.  
6

7 Nevada does not permit its residents to claim the federal exemptions set forth in § 522(d).<sup>2</sup>  
8 See NRS 21.090(3). "In bankruptcy actions, the validity of a claimed state exemption is controlled  
9 by the applicable state law." *In re Norris*, 203 B.R. 463, 465 (Bankr. D. Nev. 1996). A  
10 bankruptcy court must follow the state's rules of construction when interpreting a state statute. *Id.*  
11

12 The state exemption scheme found at NRS 21.090 sets forth property exempt from  
13 execution. Under this statute, Nevada provides for the exemption of wages, in relevant part, as  
14 follows:

- 15 1. The following property is exempt from execution, except as otherwise  
16 specifically provided in this section:

17 . . .

18 (g) For any pay period, 75 percent of the disposable earnings of a judgment  
19 debtor during that period . . . . As used in this paragraph, 'disposable  
20 earnings' means that part of the earnings of a judgment debtor remaining  
21 after the deduction from those earnings of any amounts required by law,  
to be withheld.

22 "The legislative purpose of NRS 21.090 is 'to secure to the debtor the necessary means of  
23 gaining a livelihood, while doing as little injury as possible to the creditor.'" *In re Galvez*, 115  
24 Nev. 417, 419 (1999) (quoting *Krieg v. Fellows*, 21 Nev. 307, 310 (1892)). The burden of proof  
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27 <sup>2</sup> Unless otherwise indicated, all references to "chapter" or "section" shall be to the  
28 Bankruptcy Code, 11 U.S.C. §§ 101, et seq. and the Federal Rules of Bankruptcy Procedure, Rules  
1001, et seq.

1 is on the trustee to show the exemption is improper. Fed. R. Bankr. P. 4003(c).

2 Whether the money deducted from Debtor's paychecks and deposited into her Savings  
3 Plan from June 1, 2002, through May 31, 2003, falls within Nevada's wage garnishment  
4 exemption is a matter of first impression. When a decision turns on applicable state law and the  
5 state's highest court has not ruled on the issue, the federal court must use its best judgment to  
6 determine how the state court would rule on the issue. State exemption statutes are liberally and  
7 beneficially construed in Nevada. *Norris*, 203 B.R. at 465. "A statute may be interpreted by  
8 considering the reason or spirit of the law, the causes which induced the legislature to enact it, and  
9 the entire subject matter and policy of the law." *Id.*

10 Although the Nevada Supreme Court has never directly addressed the issue to be resolved  
11 in this case, in *In re Galvez*, 115 Nev. 417 (1999), it did analyze whether a lump sum payment of  
12 real estate commission paid by a third party is exempt under NRS 21.090(1)(g). By reliance upon  
13 *Kokoszka v. Belford*, 417 U.S. 642 (1974), which found that lump sum tax refunds are not exempt,  
14 the Nevada Supreme Court held that a lump sum real estate commission payment is not exempt.  
15 It found "that NRS 21.090(1)(g) only exempts 'earnings' that are periodic in nature." *Galvez*, 115  
16 Nev. at 421. It held that the lump sum payment Galvez received for his real estate commission  
17 was not periodic, and therefore, not protected by NRS 21.090(1)(g). *Id.*

18 Here, the payments Debtor received out of the Savings Plan came from deductions from  
19 her periodic paychecks, not from a third party as in *Galvez*. Debtor's income was paid by Granite  
20 Construction. The money in her Savings Plan came from her earnings and the lump sum payment  
21 was not additional or new income. Each pay period, Granite Construction deposited a portion of  
22 her paycheck into her Savings Plan. The deductions were not voluntary because, pursuant to the  
23 Agreement, Granite Construction was required to automatically deduct a percentage of Debtor's  
24 income.

1 paycheck and deposit it into her Savings Plan. Clearly, the money deducted and deposited in the  
2 Savings Plan was hers at the outset, and therefore, any money paid to her from her Savings Plan  
3 was essentially a reimbursement of earnings taken out of her periodic paychecks. Indeed, the  
4 payments from the Savings Plan simply repay the Debtor money she would have received as part  
5 of her paycheck had the deductions not been made.  
6

7       The facts of this case are that of the periodic payments by Granite Construction to Debtor,  
8 a portion were deducted and deposited into her Savings Plan and the annual payments to her were  
9 simply a return of her earnings, while in *Galvez*, the debtor was paid a lump sum commission  
10 from a third party. This is a critical distinction and, therefore, the holding in *Galvez*, which did  
11 not exempt the lump sum commission, does not control.  
12

13       An analysis of *Kokoszka v. Belford*, *supra*, demonstrates that, unlike the factual context of  
14 *Galvez*, *supra*, the Debtor's Savings Plan deductions were exempt when made and did not lose  
15 their exempt status when distributed to her annually. The U.S. Supreme Court held in *Kokoszka*  
16 *v. Belford*, *supra*, that a tax refund is not the equivalent of future wages for the purpose of giving  
17 the bankrupt a fresh start, and thus does not limit the trustee's right to treat the tax refund as estate  
18 property. *Kokoszka*, 417 U.S. at 647. A "tax refund is not the weekly or other periodic income  
19 required by a wage earner for his basic support, to deprive him of it will not hinder his ability to  
20 make a fresh start unhampered by the pressure of preexisting debt." *Id.* at 648 (quoting *In re*  
21 *Kokoszka*, 479 F.2d 990, 995).  
22

23       In reaching its decision, the Court distinguished its holding in *Lines v. Frederick*,  
24 400 U.S. 18 (1970), where it was held that a bankrupt wage earner's accrued but unpaid vacation  
25 pay was *not* property of the estate. The tax refund in *Kokoszka* and the vacation pay in *Lines* were  
26 both "wage based;" however, the *Kokoszka* Court emphasized "the vacation pay in *Lines* was  
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1 designed to function as a wage substitute at some future period and, during that future period, to  
2 'support the basic requirements of life for (the debtors) and their families . . .'" *Kokoszka*, 417  
3 U.S. at 648 (quoting *Lines*, 400 U.S. at 20).  
4

5 The facts of this case are far more aligned with *Lines* rather than *Kokoszka*. Debtor has  
6 claimed as exempt her accrued but unpaid vacation pay. The function of Debtor's accrued  
7 vacation pay, as evidenced by her affidavit, was to pay her normal living expenses and support her  
8 basic requirements of life during periods of unemployment. That evidence is uncontroverted.

9 Here, as in *Lines*, Debtor's vacation pay was intended to function as a wage substitute, and  
10 therefore, would not constitute property of the estate. *Lines*, 400 U.S. at 18-19. While the express  
11 finding in *Lines* that vacation pay would not qualify as property of the estate has probably changed  
12 as the result of the enactment of § 541, the distinction explained in *Kokoszka* between vacation  
13 pay and a tax refund still exists today as it pertains to exemptions. While the Savings Plan might  
14 constitute property of the estate pursuant to § 541, it is exempt pursuant to NRS 21.090(1)(g).  
15

16 *Kokoszka* explains that a tax refund is not the weekly or other periodic income required by  
17 a wage earner for his basic support, and to deprive her of it will not hinder her ability to make a  
18 fresh start unhampered by the pressure of preexisting debt. *Lines*, on the other hand, reasons that  
19 payments made to Debtor out of her vacation fund, from amounts derived from deductions from  
20 her periodic paychecks, function as wage substitutes during periods of unemployment. This  
21 distinction is consistent with the requirements and the public purpose underlying Nevada's  
22 exemption of 75 percent of a debtor's disposable earnings per pay period.  
23

24 Nevada's exemption laws are intended to protect a Debtor "by permitting him to retain the  
25 basic necessities of life so that after the levy of nonexempt property he and his family will not be  
26 left destitute." *Norris*, 203 B.R. at 465-66. Therefore, allowing Debtor to retain the funds  
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1 accrued in her Savings Plan would be keeping with the public purpose behind NRS 21.090(1)(g)  
2 by preserving part of her disposable earnings so that she may support the basic requirements of  
3 life. The foregoing analysis leads to the finding that 75 percent of the periodic deductions from  
4 Debtor's paychecks deposited into the Savings Plan were and are exempt.<sup>3</sup>

#### 6 CONCLUSION

7 This court holds that the trustee has not met his burden of proving that the exemption is  
8 not properly claimed. The exemption is allowed, and should be calculated pursuant to NRS  
9 21.090(1)(g). However, 75 percent of the lump sum amount in the Savings Plan is not exempt;  
10 rather, 75 percent of each deduction and payment into the Savings Plan from each periodic  
11 paycheck Debtor received between June 1, 2002, and May 31, 2003, is exempt.<sup>4</sup>

13 An order will be entered pursuant to Fed. R. Bankr. P. 9021 consistent with this  
14 Memorandum Decision.

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21 <sup>3</sup> The deposits into the Savings Plan were never commingled with any other source of funds,  
22 and therefore, they do not lose their exempt status. *Norris*, 203 B.R. at 466 (Bankr. D. Nev. 1996).  
23 *See also, Security National Bank of Reno v. McColl*, 79 Nev. 423 (1963) (funds in a cash savings  
24 account which came from payments to a guardian by the Veterans' Administration could be  
25 withdrawn upon demand for use by the incompetent and were exempt from attachment on claims  
of creditors. The veteran benefits did not lose their exempt status once paid by the Veterans'  
Administration into the account maintained by the guardian).

26 <sup>4</sup> It is probable that any difference between exempting 75 percent of the lump sum in the  
27 Savings Plan, as Debtor urges, and exempting 75 percent of each deduction from Debtor's periodic  
28 paychecks that were deposited into the Savings Plan will be de minimis, and rather than engaging  
in an accounting that might not serve any practical function, Debtor's request might be the most  
reasonable approach.